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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

IN RE: TOLL ROADS LITIGATION

PENNY DAVIDI BORSUK; DAVID
COULTER; EBRAHIM E. MAHDA;
TODD QUARLES; TODD
CARPENTER; LORI MYERS; DAN
GOLKA; and JAMES WATKINS on
behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

FOOTHILL/EASTERN
TRANSPORTATION CORRIDOR
AGENCY; SAN JOAQUIN HILLS
TRANSPORTATION CORRIDOR
AGENCY; ORANGE COUNTY
TRANSPORTATION AUTHORITY;
3M COMPANY; BRiC-TPS LLC;
RHONDA REARDON; MICHAEL
KRAMAN; CRAIG YOUNG; SCOTT
SCHOEFFEL; ROSS CHUN;
DARRELL JOHNSON; LORI
DONCHAK; COFIROUTE USA, LLC;
and DOES 3-10; inclusive,

Defendants.

Case No: 8:16-cv-00262-ODW(ADSx)

Hon. Otis D. Wright II

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: April 23, 2021,

Time: 11:00 a.m.

Location: Judicate West

55 Park Plaza, Suite 400

Irvine, CA 92614

Special Master: Hon. Andrew J. Guilford (ret.)

*[Filed Concurrently with Declarations and
Proposed Order]*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After five years of contentious litigation, Plaintiff Dan Golka (“Plaintiff”) is pleased to announce that a settlement has been reached with the Orange County Transportation Authority (“OCTA”), Darrell Johnson, Lori Donchak and Cofiroute USA, LLC (“Cofiroute”) (the “Settling Defendants”)¹ to resolve all claims and end the litigation. In this motion, Plaintiff seeks preliminary approval of the class settlement, which he and Class Counsel believe is fair, reasonable and adequate, as described in more detail below.

This litigation concerns Plaintiff’s claim – and the claims of the certified Class of toll road drivers on the 91 Express Lanes and other California toll roads, including State Routes 73, 133, 241, 261, that Plaintiff represents – that Defendants improperly share their personally identifiable information (“PII”) with third parties in violation of California Streets and Highways Code § 31490, as well as several other consumer, constitutional and common law claims. Plaintiff’s claims have been vigorously prosecuted by Class Counsel and aggressively challenged by the five Defendants in this action. An agreement to settle was reached only after multiple extensive and lengthy arms’ length negotiations over a period of more than a year.

The class settlement provides significant and meaningful relief to the OCTA/Cofiroute subclasses: the total monetary value of the settlement is \$41 million, consisting of cash of \$1 million as well as penalty forgiveness of \$40 million. Any remaining cash after distribution to eligible class members will be donated to Privacy Rights Clearinghouse as a *cy pres* award. The settlement also provides important programmatic relief relating to, among other things, the reduction of the maximum

¹ Defendants Foothill/Eastern Transportation Corridor Agency, San Joaquin Hills Transportation Corridor Agency, Michael Kraman, Craig Young, Scott Schoeffel, Ross Chun, Rhonda Reardon (collectively “TCA”), BRiC-TPS, LLC (“BRiC”) and 3M Company (“3M”) are not the subject of this Motion. Their settlements with the Plaintiffs were the subject of an earlier motion for preliminary approval.

1 penalty imposed by OCTA for toll violations and an agreement that OCTA and
2 Cofiroute will not provide additional PII to third-party debt collectors.

3 The settlement was only achieved after five years of hard-fought litigation
4 which included multiple Motions to Dismiss, Motions for Judgment on the Pleadings,
5 three rounds of Motions for Summary Judgment, Class Certification, a 23(f) petition
6 to the Ninth Circuit (which denied the petition), a Motion to Decide Key Questions,
7 production and review of over 500,000 pages of documents, 34 depositions, expert
8 discovery, and third-party depositions across the country. The settlement negotiations
9 were just as intense and hard-fought, including three rounds of good faith, arms'-
10 length mediation before highly respected mediators – the last two before Robert
11 Kaplan. The history of the litigation is described in more detail in the Declaration of
12 Helen I. Zeldes (“Zeldes Decl.”), one of the three Co-Lead Class Counsel, filed
13 concurrently with this Memorandum.

14 Class Counsel believe that the settlement amounts reached here are an excellent
15 result for the Settlement Class, particularly given the risks attendant to further
16 litigation. The settlement provides meaningful monetary and programmatic relief. As
17 discussed further below, the settlement is similar in structure to and compares
18 favorably to the TCA settlement, which the Special Master recommended preliminary
19 approval of on December 30, 2020. In particular, in light of the valuable benefits to
20 members of the Settlement Class, and the significant risks the Settlement Class would
21 face if the litigation continued - including taking into account the Court’s January 17,
22 2020 order on Key Legal Questions (defined below) ruling against Plaintiff on several
23 of Plaintiff’s class claims against Settling Defendants - the terms of the settlement are
24 “fair, reasonable, and adequate” and merit preliminary and ultimately final approval.
25 Class Counsel therefore respectfully request that this Court grant preliminary approval
26 of the settlement.

27 //

28 //

II. BACKGROUND AND PROCEDURAL HISTORY

A. The Complaint

This action was initially filed in California state court on October 2, 2015, and later removed to federal court on February 16, 2016. OCTA and Cofiroute were served after removal. Two additional federal actions were filed against the TCA and 3M Defendants and eventually consolidated into the current litigation in 2016. Motions to Dismiss were granted in part and denied in part on December 20, 2016. Plaintiff filed the operative Corrected First Amended Class Action Complaint on January 19, 2017 (Dkt. 119-1). OCTA answered on February 15, 2017, and Cofiroute answered on March 6, 2017.

Plaintiff's complaint brought a claim under California Streets and Highways Code section 31490 ("§ 31490") (the only cause of action to which class certification was granted) alleging that Defendants improperly provide PII of users and subscribers of Orange County toll roads (including Plaintiff) to dozens of third parties in violation of § 31490(a), subjecting them to statutory damages of \$2,500 to \$4,000 per violation under § 31490(q). Plaintiff also alleged that Defendants violated other laws and statutes, including an excessive fines claim (stemming from penalties they imposed on toll violations), due process claims (stemming from their toll violation notices, administrative review procedures and lack of signage), as well as other related claims.

B. Discovery

The parties engaged in extensive discovery, including the production of and review of over 500,000 pages of documents, depositions of 34 witnesses, expert discovery, and a site inspection of the computerized database and software system maintained by Cofiroute on behalf of OCTA. *See* Zeldes Decl. at ¶ 7. Discovery took place over the course of two years. *Id.* Third party subpoenas were issued to 15 parties, and depositions of several of those third parties were also undertaken. *Id.*

///

///

1 **C. Judgment on the Pleadings**

2 Defendants filed Motions for Judgment on the Pleadings on March 24, 2017.
3 After extensive briefing and oral argument, the Court granted in part and denied in
4 part each motion on August 2, 2017. Dkt. 204. The Court dismissed Plaintiff's
5 Rosenthal Act claim and also dismissed claims for damages under the California
6 Constitution. The parties continued with discovery on Plaintiff's § 31490, negligence,
7 constitutional privacy, due process and excessive fines claims.

8 **D. Summary Judgment**

9 Defendants sought summary judgment on multiple occasions, requiring
10 extensive briefing each time. Zeldes Decl. at ¶12. Motions for partial summary
11 judgment were first filed in March of 2017, but later withdrawn, only to be renewed
12 in September of 2017. Among other things, at issue in the summary judgment motions
13 were Plaintiff's claims under § 31490, which became the focus of the litigation. *Id.*

14 On January 12, 2018, the Court granted Defendants summary judgment on the
15 portion of Plaintiff's claim based on alleged violations of the privacy policy but denied
16 the motions without prejudice as to the rest of Plaintiff's claim for improper sharing
17 of PII. Dkt. 297. Discovery continued on the remainder of the claims. *Id.* at ¶13.

18 Settling Defendants' third motions for summary judgment were filed on July
19 17, 2018. The motions, which challenged both the individual claims of the two
20 plaintiffs with claims against OCTA and Cofiroute and privacy claims that were later
21 certified, were fully briefed. But before oral argument was held on the motions, the
22 case was stayed to allow the petition for an appeal of the class certification to be
23 decided and the parties to pursue possible settlement through mediation. There have
24 not been rulings on those summary judgment motions. *Id.* at ¶14.

25 **E. Class Certification**

26 Plaintiff's Motion for Class Certification was filed on April 27, 2018 with a
27 class certification hearing on July 31, 2018. The Court certified a class based on
28 claims under § 31490 ("Privacy Class") and amended the class definition a few

1 months later, but declined to certify any other claims. Dkt Nos. 439, 501. Defendants
2 3M and TCA filed a motion for reconsideration, which the Court denied. 3M then
3 filed a petition seeking permission to appeal the Class Certification Order in the Ninth
4 Circuit, which OCTA and Cofiroute joined. That petition was denied in April of 2019.
5 After the Class Certification Order, Plaintiff filed a motion for approval of a Privacy
6 Class notice plan. However, the case was stayed pending 3M's petition while the
7 parties pursued mediation and, therefore, there wasn't a hearing or ruling on the
8 motion and notice of the Class Certification Order wasn't given to the Privacy Class.
9 Zeldes Decl. at ¶9.

10 **F. Ruling on Key Questions**

11 Over the course of the litigation, Defendants suggested to the Court that, with
12 respect to certain issues concerning elements of the § 31490 claim, resolution of
13 particular "key questions" would help the parties resolve the matter. After two
14 mediations were unsuccessful in resolving the case, and following denial of 3M's
15 petition, Defendants filed their motion to determine key questions on June 10, 2019
16 ("Key Questions Motion"), and the parties briefed the motion. The Court withheld its
17 ruling on the matter for several months, which provided an impetus for further
18 settlement negotiations. Plaintiffs reached settlements in principle with TCA and 3M
19 before the ruling was issued, but despite good faith continuing efforts, were not able
20 to reach an agreement with OCTA and Cofiroute. Zeldes Decl. at ¶10.

21 On January 17, 2020, the Court issued its ruling on the Key Questions Motion.
22 In its ruling, the Court found that certain types of transmissions for interoperability
23 and/or collection and enforcement of toll and toll violation penalties did not violate §
24 31490. [Dkt. No. 566] Specifically, the Court found in favor of Settling Defendants
25 on the merits of the claims asserted by the Interoperability, DMV and Car Rental
26 Subclasses. With regard to the Debt Collection Subclass, the Court found that
27 providing information to a third-party collection agency to collect unpaid delinquent
28 tolls and penalties is permitted by § 31490, but that insufficient information had been

1 presented as to what specific information is provided and whether that information is
2 reasonably necessary for enforcement and collection purposes. Zeldes Decl. at ¶11.

3 **G. The Parties' Extensive Mediation Efforts**

4 The Parties held an unsuccessful full-day mediation with mediator Lynn Frank
5 early in the case. On February 25, 2019, Plaintiff and all Defendants participated in a
6 mediation with Robert Kaplan. Hard fought, intensive and arms' length negotiations
7 over the course of a full day did not result in a settlement. Nevertheless, Class Counsel
8 and counsel for Settling Defendants continued to discuss settlement informally. On
9 March 2, 2020, Plaintiff and Settling Defendants participated in a second mediation
10 with Mr. Kaplan. The parties made significant progress toward a resolution, including
11 a conceptual agreement on many of the basic terms of a settlement. Mr. Kaplan
12 submitted a Mediator's Proposal, which was accepted by all of the Parties subject to
13 approval of the OCTA Board of Directors. The settlement was approved by the OCTA
14 Board of Directors on April 27, 2020. *See* Zeldes Decl. at ¶15.

15 **III. TERMS OF THE SETTLEMENT AGREEMENT**

16 **A. The Settlement Class Definition**

17 The proposed Settlement Class is similar to the class certified as to Settling
18 Defendants. It consists of the following individuals whose PII was provided by OCTA
19 or Cofiroute to an entity described below between June 29, 2015 and 10 days after
20 preliminary approval is granted:

- 21 • Any person with a non-OCTA transponder account whose PII, including
22 the date, time and location of a toll transaction, was sent by Settling Defendants
23 to the TCA or other California toll agency for purposes of collecting a toll
24 incurred on the 91 Express Lanes (the "Interoperability Subclass");
- 25 • Any person whose license plate number was sent by Settling Defendants
26 to the California Department of Motor Vehicles or out-of-state equivalent,
27 directly or through a subcontractor, in connection with more than one alleged
28 toll violation incurred on the 91 Express Lanes (the "DMV Subclass")

- Any person whose PII was sent by Settling Defendants to a car rental company in connection with an alleged toll violation incurred on the 91 Express Lanes (the “Car Rental Subclass”); and
- Any person whose PII, other than the amount of tolls and penalties owed, the violation number, or the violator’s account number, was sent by Settling Defendants to a third-party debt collector for collection of unpaid tolls and/or toll violation penalties incurred on the 91 Express Lanes (the “Debt Collection Subclass”).

The following individuals are excluded from the Settlement Class: Current members of the OCTA Board of Directors, OCTA’s Chief Executive Officer, the General Manager of the 91 Express Lanes, OCTA’s 91 Express Lanes Project Manager III, the attorneys representing OCTA and Cofiroute in this Litigation. and the judge to whom this case is or was assigned, any member of the judge’s immediate family, and any member of the judge’s staff.

B. The Settlement Benefits

The total settlement includes \$1 million dollars in cash, \$40 million dollars in penalty forgiveness, and programmatic relief, including a reduction in OCTA’s maximum toll violation penalty. Specifically, the settlement provides:

1. Cash Payments

OCTA will contribute \$1 million dollars to a cash settlement fund. Subject to the Court’s approval, the cash contribution will be used to fund the Cash Awards, class notice and administration costs, cost of the Special Master, any attorneys’ fees awarded to Class Counsel, and Service Award to the Class Representative. The remainder will be distributed: 1) on a pro rata basis to the members of the Debt Collection Subclass who are not eligible for penalty forgiveness because they do not have outstanding unpaid penalties and who submit valid claims, up to a maximum of \$15.00 per person; 2) any remaining funds will be donated to Privacy Rights Clearinghouse as a *cy pres* award.

1 There are approximately 320,000 members in the Debt Collection Subclass².
2 Of those, approximately 180,000 will be eligible to submit a claim for a cash
3 award/distribution. Assuming even a healthy 10% response rate, each claimant would
4 receive the full \$15.00 payment.

5 **2. Penalty Forgiveness**

6 OCTA will also provide a substantial \$40 million dollars in penalty forgiveness
7 to Debt Collection Subclass Members with outstanding penalties (“Penalty
8 Forgiveness Eligible Class Members”). The penalty forgiveness amount will be
9 distributed in two steps: First, all penalties owed as of the Settlement Class Period
10 End Date by Penalty Forgiveness Eligible Class Members will be reduced to \$100.00
11 per violation (from a current maximum of between \$150 and \$190). Second, the
12 remainder of the \$40 million penalty forgiveness fund will be allocated on a per capita
13 basis to all Penalty Forgiveness Eligible Class Members and applied to the remaining
14 balance of their outstanding penalties,

15 Of the approximately 320,000 members of the Debt Collection Subclass,
16 approximately 140,000 still owe tolls and penalties. Reduction of each outstanding
17 penalty to no more than \$100 will use approximately \$34.2 million of the \$40 million
18 in penalty forgiveness. Each eligible class member would then receive an additional
19 penalty reduction of approximately \$40. Here are a few examples to illustrate the
20 possible reductions:

- 21 - If a Class Member had 10 toll violations in a one-year period, the total
22 penalty owed (not including tolls) would be \$1,810 (\$100 for the first

23
24 ² The counts of Debt Collection Subclass members were generated during negotiation
25 of the terms of the Cash Award and penalty forgiveness provisions of the settlement.
26 To avoid an expected delay to obtain current counts, the June 30, 2020 counts are used
27 herein. An estimate of current counts can be extrapolated from the counts used herein.
28 But given that the class period is approaching six years it is not believed that an update
of the counts from nine months ago would materially affect the evaluation of the
settlement benefits. This is particularly true since OCTA slowed enforcement efforts
during the COVID pandemic.

1 violation, \$150 for the second violation, and up to \$195 for each successive
2 violation). After reduction of all penalties to \$100 and allocation of the
3 additional \$40 forgiveness, this Class Member would owe \$960.00 in
4 penalties.

- 5 - If a Class Member had 35 unresolved violations in a one-year period, the
6 penalties owed would be \$6,685. After allocation of the forgiveness, the
7 Class Member would owe \$3,460 in penalties.
- 8 - And if a Class Member had just one violation, the post-forgiveness penalty
9 amount owed would be \$60.00.

10 Approximately 25% of all toll violators on the 91 Express Lanes are referred
11 for debt collection. The other 75% of violations are resolved by Cofiroute. There is
12 currently approximately \$92 million owed by members of the Debt Collection
13 Subclass. Cofiroute's subcontracted debt collection agency continues active measures
14 to collect this debt. Any debt over \$5,000 that is not resolved by the debt collection
15 agency is reduced to a judgment, and judgments are renewed if they remain
16 unresolved. Another method for collecting unpaid tolls and penalties is a tax refund
17 intercept with the Franchise Tax Board.

18 There is no requirement to submit a claim form to receive penalty forgiveness
19 - it will be electronically credited to the violation accounts of the Penalty Forgiveness
20 Eligible Class Members. For debts that have been reduced to judgments, partial
21 satisfaction of judgments will be filed.

22 **3. Remedial Measures Attributable to the Settlement**

23 In addition to the cash and penalty forgiveness, as additional benefits of the
24 settlement, OCTA will reduce the maximum per-violation penalty to \$100.00 from a
25 maximum penalty of 20x the highest system wide toll. The highest the toll penalty has
26 been during the class period is \$195.00. In addition, absent a change in existing
27 California law regarding the PII that can be provided to a third-party debt collector,
28 and without conceding that a unique violator ID number assigned to each toll violator

1 is PII, the Parties have agreed that the only PII of toll violators that Settling Defendants
2 will provide to a subcontracted third-party debt collector will be the information
3 contained in the relevant toll violation notice(s), together with any updated contact,
4 address and/or email information, and a unique toll violator identification number
5 assigned by Cofiroute.

6 **C. Notice to the Class**

7 Pursuant to Rule 23(e), the Class Administrator will provide Settlement Class
8 Members with settlement notice as follows:

9 - Members of the Debt Collection Subclass and those members of the
10 Interoperability Subclass for whom TCA does not have email addresses or the
11 email bounces back will be sent postcard notice via U.S. mail to the Class
12 Member's last known address. (Settlement Agreement ¶8.01; Declaration of
13 Cameron R. Azari Esq. on OCTA Settlement Notice Plan. ("Azari Decl.") ¶
14 18.) The mailed settlement notice will contain a detachable claim form allowing
15 participating eligible Class Members to claim in for a cash distribution. The
16 mailed settlement notice will also provide the web address for the website
17 where Class Members may electronically submit a claim form.

18 - Members of the Interoperability Subclass for whom TCA provides names
19 and email addresses will be emailed written settlement notice. (Settlement
20 Agreement ¶8.01; Azari Decl. ¶ 16). Settlement Class Members who receive
21 settlement notice by email will receive a link in the email that will take them
22 directly to the settlement website, which will contain the long form of the
23 settlement notice. Azari Decl. ¶ 17.

24 - For the remaining Settlement Class members, settlement notice will be
25 provided by print publication and social media. Azari Decl. ¶6. This includes
26 toll violators who had their license plate numbers submitted more than once to
27 the DMV, individuals who incurred toll violations while driving a rental car,
28 and individuals with an account with another California toll agency other than

1 TCA who paid a toll through the interoperability system for whom no contact
2 information is reasonably available.

3 **D. Proposed Class Representative Service Award**

4 Subject to Court approval, Class Counsel will seek a payment of up to \$5,000
5 as a service award to Dan Golka for his service as Class Representative³. (Settlement
6 Agreement ¶ 4.01). Mr. Golka has been an enthusiastic and active class
7 representative. He has actively participated in the prosecution of this action by:
8 reviewing and approving his original complaint and the Consolidated Complaint;
9 sitting for a full-day deposition; responding to multiple lengthy sets of written
10 discovery; communicating regularly with Class Counsel; submitting a declaration in
11 opposition to Settling Defendants' motions for summary adjudication; and generally
12 staying informed about the progress of the litigation and acting in the interests of the
13 proposed Class. He put his name and reputation on the line for the sake of the Class,
14 and no recovery would have been possible without his critical role. Zeldes Decl. ¶31.
15 The proposed maximum \$5,000 service award is consistent with those approved in
16 other consumer class action settlements that have been pending as long as this one
17 has.

18 **E. Attorneys' Fees and Costs**

19 The settlement value of the monetary component of the settlement is \$41
20 million, which includes cash and monetary forgiveness. Class Counsel will seek
21 \$250,000. This amount represents one-quarter of the settlement fund and less than
22 1% of the monetary components of the settlement. Such a request is well below the
23 Ninth Circuit's 25% "benchmark" percentage for such awards. *See, e.g., Deluca v.*
24 *Farmers Insurance Exchange*, 2020 WL 5071700 (N.D. Cal. August 24, 2020);
25 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002); *In re Online*
26 *DVD-Rental Antitrust Litig.*, 779 F.3d 934, 949 (9th Cir. 2015); *see also Schulein v.*

27
28 ³ Only two of the named plaintiffs have claims against Settling Defendants. David Coulter is not a party to the Settlement Agreement.

1 *Petroleum Dev. Corp.*, No. SACV 11-1891 AG (ANX), 2015 WL 12698312, at *6
2 (C.D. Cal. Mar. 16, 2015) (30% of the settlement is “certainly not unique, especially
3 in common fund cases” and “is similar to awards in other cases, which favors granting
4 the motion.”). Nonetheless, an upward adjustment above the benchmark percentage
5 would have been warranted under these circumstances.

6 The Proposed Order Granting Preliminary Approval provides that Class
7 Counsel will file a motion for payment of attorneys’ fees and expenses prior to the
8 Final Approval Hearing. As that motion will make clear, the \$250,000 to be sought is
9 reasonable as a percentage of the fund and is also commensurate with the substantial
10 lodestar incurred in this matter. Class Members will have the opportunity to comment
11 on or object to the fee petition under Rule 23(h), consistent with Ninth Circuit
12 authority. *See Mercury Interactive Corp. Sec. Litig. v. Mercury Interactive Corp.*, 618
13 F.3d 988, 993-94 (9th Cir. 2010).

14 **F. The Class Administrator**

15 The Parties propose that Epiq Class Action & Claims Solutions, Inc.—an
16 experienced and reputable national class action administrator—serve as Class
17 Administrator to provide notice; administer and make determinations regarding claim
18 forms; process settlement payments; make distributions; and provide other services
19 necessary to implement the settlement. (Settlement Agreement ¶¶ 6.01, 6.03, 7.01,
20 7.02, 8.01, 8.02, 8.04, 8.05, 8.06.) This is the same administrator being used for the
21 TCA and 3M settlements. The costs of the Class Administrator will be paid out of the
22 settlement fund. Pre-final approval costs are estimated to be \$217,000.

23 **IV. PRELIMINARY APPROVAL IS APPROPRIATE**

24 **A. Legal Standards**

25 Federal Rule of Civil Procedure 23(e) governs a district court’s analysis of the
26 fairness of a proposed class action settlement. First, a court must determine that it is
27 likely to (i) approve the proposed settlement as fair, reasonable, and adequate, after
28 considering the factors outlined in Rule 23(e)(2), and (ii) certify the settlement class

1 for judgment. See Fed. R. Civ. P. 23(e)(1)(B). Second, a court must direct notice to
2 the proposed settlement class, describing the terms of the proposed settlement and the
3 definition of the proposed class, to give them an opportunity to object to or to opt out
4 of the proposed settlement. See Fed. R. Civ. P. 23(e)(1), (5). Third, after a hearing,
5 the court may grant final approval of the proposed settlement on a finding that the
6 settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2).

7 Rule 23 provides that "the claims, issues, or defenses of ... a class proposed to
8 be certified for purposes of settlement may be settled. . . only with the court's
9 approval." Fed. R. Civ. P. 23(e). "The primary concern of [Rule 23(e)] is the protection
10 of th[e] Class Members, including the named plaintiffs, whose rights may not have
11 been given due regard by the negotiating parties." *Officers for Justice v. Civil Service*
12 *Comm'n of the City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982), cert.
13 denied, 459 U.S. 1217 (1983). Therefore, a district court must determine whether a
14 proposed class action settlement is "fundamentally fair, adequate, and reasonable."
15 *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); see Fed. R. Civ. Proc. 23(e).
16 Whether to approve a class action settlement is "committed to the sound discretion of
17 the trial judge." *Class Plaintiffs. v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992),
18 cert. denied, *Hoffer v. City of Seattle*, 506 U.S. 953 (1992). The Court may approve a
19 settlement agreement "after a hearing and on finding that it is fair, reasonable, and
20 adequate." Fed. R. Civ. P. 23(e)(2).

21 "If the proposed settlement 'appears to be the product of serious, informed,
22 non-collusive negotiations, has no obvious deficiencies, does not improperly grant
23 preferential treatment to class representatives or segments of the class, and falls within
24 the range of possible approval,' the court should grant preliminary approval of the
25 class and direct notice of the proposed settlement to the class." *Kenneth Glover, et al.*
26 *v. City of Laguna Beach, et al.*, 2018 WL 6131601, at *2 (C.D. Cal. 2018) (Guilford,
27 J.) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079-80 (N.D.
28 Cal. 2007)).

1 A court reviewing a proposed class action settlement must balance a number of
2 factors, including “the strength of the plaintiffs' case; the risk, expense, complexity,
3 and likely duration of further litigation; the risk of maintaining class action status
4 throughout the trial; the amount offered in settlement; the extent of discovery
5 completed and the stage of the proceedings; the experience and views of counsel; the
6 presence of a governmental participant; and the reaction of the class members to the
7 proposed settlement.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)
8 (overruled on other grounds by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)).
9 Balancing these factors and the factors identified in Rule 23(e) in this case support
10 approval of the proposed settlement.

11 **B. Class Certification**

12 The Court has already certified the Privacy Class for litigation of the claims
13 under Streets and Highways Code § 31490. *See* Dkt. 501 pp. 19-20. The proposed
14 Settlement Class is similar to the certified Privacy Class with regard to the claims
15 asserted against OCTA and Cofiroute. It is slightly different as membership in the
16 certified Privacy Class is defined based on whether the consumer used one of the toll
17 roads during the Class Period. However, membership in the Settlement Class is
18 defined based on whether the consumer’s PII was shared during the Class Period.
19 Plaintiff believes that the sharing of PII is the relevant factor as that is what triggers
20 the application of SHC § 31490. Second, the certified privacy class in the Class
21 Certification Order contains six bullet points which include some claims pertaining to
22 only the other defendants in the litigation. The Settlement Class includes only those
23 relating to the Settling Defendants. For the reasons outlined in the Court’s order on
24 Class Certification and as further discussed below, the Settlement Class should be
25 certified as it meets the requirements of FRCP 23(a) and 23(b)(3).

26 **1. The Class is Sufficiently Numerous**

27 Rule 23(a)(1) requires that "the class is so numerous that joinder of all members
28 is impracticable." Fed. R. Civ. P. 23(a). “It’s generally accepted that when a proposed

1 class has at least forty members, joinder is presumptively impracticable based on
2 numbers alone.” Dkt. 501 at p.8 (citations omitted). Settling Defendants estimate that
3 there are approximately 1.3 million individuals in the Settlement Class, therefore
4 numerosity is satisfied.

5 **2. There are Common Questions of Law and Fact**

6 The commonality requirement is satisfied if "there are questions of law or fact
7 common to the class." Fed. R. Civ. P. 23(a)(2). As this Court found in certifying the
8 Privacy Class:

9 So long as there is even a single common question, a would-be class can
10 satisfy the commonality requirement of Rule 23(a)(2). Plaintiffs state in
11 broad terms several questions that are common to the class, including
12 whether Defendants violated privacy laws by sharing drivers’ PII with
13 third parties. That’s enough to satisfy Rule 23(a)(2).

14 See Dkt. 501 at p.8 (internal citations and quotations marks omitted) Here, the
15 Settlement Class involves the same questions of law and fact. This includes
16 whether Settling Defendants violated privacy laws by sharing Class Members’
17 PII with third parties. The transmissions at issue were done on a uniform basis
18 based on Standard Operating Procedures (“SOPs”), automated processes, and
19 policies that ensure toll collection is executed in a uniform manner and not on
20 an individualized basis. Commonality is satisfied.⁴

21 ///

22 ///

24 ⁴ Pursuant to the Settlement Agreement, Settling Defendants have agreed not to
25 contest class certification solely for the purposes of settlement. Pursuant to the
26 Settlement Agreement, certification of the Settlement Class will not be deemed a
27 concession that certification of a litigation class is appropriate, nor are Settling
28 Defendants precluded from challenging class certification in further proceedings in
this Litigation or in any other action if the Settlement Agreements are not finalized or
finally approved. Settlement Agreement, ¶3.01.

1 **3. The Class Representative's Claim is Typical of Those of Other**
2 **Class Members**

3 Rule 23(a)(3) requires that the Class Representative's claims be typical of those
4 of the Class. "The test of typicality is whether other members have the same or similar
5 injury, whether the action is based on conduct which is not unique to the named
6 plaintiffs, and whether other class members have been injured by the same course of
7 conduct." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (internal quotation
8 marks omitted). "[R]epresentative claims are 'typical' if they are reasonably co-
9 extensive with those of absent class members; they need not be substantially
10 identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Here,
11 Plaintiff Dan Golka's claims stem from Settling Defendants' uniform practices of
12 sharing PII. Mr. Golka thus satisfies the typicality requirement of Rule 23(a)(3).

13 **4. Class Representative and Class Counsel Adequately Represent**
14 **Class Members**

15 Rule 23(a)(4) permits certification of a class action only if "the representative
16 parties will fairly and adequately protect the interests of the class. FRCP 23(a)(4).
17 Resolution of two questions determines legal adequacy: (1) do the named plaintiffs
18 and their counsel have any conflicts of interest with other class members and (2) will
19 the named plaintiffs and their counsel prosecute the action vigorously on behalf of the
20 class?" *Hanlon*, 150 F.3d at 1020.

21 Plaintiff and his counsel are adequate. First, the proposed Settlement Class
22 Representative and his Counsel do not have any conflicts of interest with the absent
23 Class Members. *See* Dkt. 501 p. 10. Second, as the Court has found, Plaintiff and Class
24 Counsel have vigorously prosecuted the action on behalf of the Class for nearly four
25 years. *Id.* As detailed above, Class Counsel engaged in significant discovery. *See*
26 *supra*, §II.B. Class Counsel defended against over twenty dispositive motions and
27 moved for and extensively litigated class certification issues. *See id.* The Settlement
28 Class Representative was likewise actively engaged—he produced numerous

1 documents, sat for a lengthy deposition, and regularly communicated with counsel up
2 to and including evaluating and approving the proposed Settlement. *See* §III.D. He
3 supported the terms of the settlement and has expressed his continued willingness to
4 protect the Class until the Settlement is approved and its administration completed.
5 *See* Zeldes Decl., ¶ 32. Thus, adequacy is satisfied.

6 **5. Common Issues of Law and Fact Predominate**

7 In addition to the requirements of Rule 23(a), at least one of the prongs of Rule
8 23(b) must be satisfied. Rule 23(b)(3) allows certification of a class if the Court finds
9 that "questions of law or fact common to class members predominate over any
10 questions affecting only individual members, and that a class action is superior to other
11 available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ.
12 P. 23(b)(3). "The predominance inquiry of Rule 23(b)(3) asks 'whether proposed
13 classes are sufficiently cohesive to warrant adjudication by representation.' " *In re*
14 *Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009)
15 (quoting *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas*
16 *Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001)). As this Court found, "Since Plaintiffs
17 seek to recover statutory damages for the class, the central issue of their § 31490 claim
18 is determining what PII transfers violate § 31490 and what PII transfers fall under an
19 exception. And since Settling Defendants make PII available according to uniform
20 policies, resolving that central issue can easily be done on a class-wide basis. So
21 common questions prominently predominate the § 31490 claim." Dkt. 501 at p. 12.

22 **6. Superior Method of Adjudication**

23 Rule 23(b)(3) lists four factors relevant to the Court's decision on whether a
24 class action is superior to other forms of litigation: (1) the class members' interests in
25 individually controlling the litigation; (2) the extent and nature of any litigation
26 concerning the controversy already begun by or against class members; (3) the
27 desirability or undesirability of concentrating the litigation of the claims in the
28 particular forum; and (4) the likely difficulties in managing a class action. FRCP

23(b)(3). As this Court found, all four factors are met here. Dkt. 501 at P. 14.

C. The Proposed Settlement Should be Preliminarily Approved

Rule 23(e)(2) identifies criteria for the Court to use in deciding whether to grant preliminary approval of a proposed class settlement and direct notice to the proposed class. The Class Settlement proposed here satisfies each criterion.

1. The Class Representatives and Class Counsel have adequately represented the Settlement Class

As set forth in the Zeldes Decl., ¶¶ 24-32, the Class Representative and Class Counsel have adequately represented the class.

2. The Settlement Was Negotiated at Arm's Length

As set forth above, Plaintiff achieved the settlement after five years of hard fought, contested litigation and through extensive, hard fought, arm's-length negotiations. Class Counsel will be paid from the same settlement fund as eligible Class Members and the amount of their fees will be measured in part against the value of the settlement, such that Class Counsel had every incentive to secure the largest fund possible. There is no indication of collusion or fraud in the settlement negotiations, and none exists.

3. The Relief Provided for the Class is Adequate

The settlement provides substantial Class relief, considering (i) the costs, risks, and delay of trial and lengthy appeals; (ii) the effectiveness of the proposed distribution plan; and (iii) the terms of the proposed award of attorney's fees. *See* Fed. R. Civ. P. 23(e)(2)(C).

i. The Costs, Risks, And Delay of Trial and Appeal

This factor overwhelmingly weighs in favor of preliminary approval of the settlement. The risk, expense, complexity, and likely duration of further litigation in this action are substantial. This case involves a matter of first impression: the analysis of a novel state law with no federal equivalent. As evidenced in this case, there were

1 many legal and factual issues raised in many motions throughout the five years the
2 case was litigated.

3 On January 17, 2020, the Court ruled in favor of Settling Defendants on three
4 of the four § 31490 claims asserted by the class: the interoperability claims, the DMV
5 license plate lookup claims, and the car rental company claims. These rulings had a
6 significant adverse impact on the claims of more than 80% of the class members and
7 almost 95% of the challenged PII transmissions. While the Settlement Class could
8 eventually appeal that ruling, any such appeal would have to wait until after trial on
9 the remaining certified and uncertified claims. Given current court congestion and
10 slow-downs due to the Covid-19 pandemic, as well as the need to give class notice of
11 the Certification Order under FRCP 23(c) if the settlement is not approved, the filing
12 of any appeal could be delayed a year or more. The appeal itself could then take
13 another year or more.

14 The only remaining unresolved § 31490 claim asserted by the Settlement Class
15 against OCTA and Cofiroute is the allegation that too much PII is provided to the
16 contracted third-party debt collector who pursues unpaid toll violation penalties on
17 behalf of OCTA. Many of the individual federal and state law claims of the
18 Representative Plaintiff are also not yet resolved. Resolution of the remaining claims
19 would likely entail additional expensive motion practice, including a renewed motion
20 for summary judgment by Settling Defendants. Any claims left after that motion
21 would have to be tried. As noted above, it could be a year or more before the remaining
22 claims are resolved at the trial court level. And there remains a risk that the Court
23 would eventually rule in favor of the Settling Defendants on the remaining § 31490
24 claim.

25 Even if the Court were to rule in favor of Plaintiff on the remaining § 31490
26 issue, Settling Defendants have already indicated that they would appeal any such
27 ruling. Settling Defendants have also repeatedly stated throughout this litigation that
28 given the statutory damages at issue in the case, if Plaintiff was to prevail, it could

1 bankrupt them and there would be no money to go after at the end of the day.
2 Furthermore, since the amount of potential statutory damages in this case is substantial
3 and the liability issues are ones of first impression, Settling Defendants have stated
4 that if judgment were entered against them, they would challenge such a judgment as
5 a violation of due process, which may lead to the Court significantly reducing the
6 amount of damages. These risks are substantial. On the other hand, the settlement
7 provides immediate significant relief to Settlement Class Members without the delay
8 of trial and appeal. Therefore, this factor strongly supports preliminary approval of
9 the settlement.

10 **ii. The Effectiveness of The Proposed Method of**
11 **Distributing Relief to the Class, Including the Method of**
12 **Processing Class-Member Claims**

13 As discussed in Sections III.B., *supra*, the penalty forgiveness will be provided
14 to the Debt Collection Settlement Subclass members automatically without them
15 having to submit a claim. For those in the Debt Collection Subclass who are not
16 eligible for penalty forgiveness, they will need to submit a claim form, which can be
17 filled out online or mailed in. Those class members will receive cash payments on a
18 pro-rata basis up to a maximum of \$15.00.

19 The remaining Settlement Class Members (Interoperability, DMV and Car
20 Rental Subclasses) will not receive a direct monetary benefit. This is appropriate for
21 at least two reasons. First, the merits of the claims of these class members have been
22 decided against them in the ruling on the Key Questions Motion. Overcoming that
23 ruling through an appeal would be difficult, time consuming and expensive. Given the
24 substantive rulings against these class members, any monetary award through a
25 settlement would necessarily be very small. The cost of mailed notice, claims
26 administration, and distribution of any such small awards would be prohibitive –
27 indeed, likely much more than the awards themselves.
28

Second, the Interoperability, DMV and Car Rental Subclass members will receive the benefit of a possible *cy pres* award to a local non-profit privacy advocacy group, Privacy Rights Clearinghouse.⁵ And to the extent any of them incur toll violations in the future, they will benefit from the lower maximum toll violation penalty and the agreement regarding the information that can be provided to a third-party debt collector. The Ninth Circuit has repeatedly held that a settlement does not have to provide financial compensation to be fair, reasonable, and adequate. *Hanlon v. Chrysler Corp.*, *supra*, 150 F.3d 1011, 1026-27 (approving a settlement that provided a fix to defective cars with no cash payments); *Lane v. Facebook*, 696 F.3d at 819, 826 (9th Cir. 2012) (approving a purely *cy pres* settlement in a consumer privacy class action where direct distribution would be infeasible), *reh'g en banc denied*, 709 F.3d 791 (9th Cir. 2013). Other courts have also approved such class action settlements. *Carr v. Tadin, Inc.*, 51 F. Supp. 3d 970, 976-77 (S.D. Cal. 2014) (approving a settlement for injunctive relief in the form of labeling changes where a damages award was unlikely and the cost of administering monetary relief would have been prohibitive); *McDonough v. Horizon Blue Cross Blue Shield of N.J.*, 641 F. App'x 146, 151 (3d Cir. 2015) (“a [class] settlement can be fair without involving pecuniary relief”); *Green v. Am. Exp. Co.*, 200 F.R.D. 211, 212-13 (S.D.N.Y. 2001) (approving a class action settlement for improved disclosures and no cash award).

iii. The Terms of Any Proposed Award of Attorney's Fees, Including Timing of Payment

Any attorneys’ fees awarded to Class Counsel are to be paid from the settlement fund after final approval in the up to amount set forth in Section III, *supra* and as will be further discussed in Plaintiff’s motion for attorneys’ fees that will be filed before the Objection deadline.

⁵ The Privacy Rights Clearinghouse was founded in 1992 as part of the University of San Diego School of Law’s Center for Public Interest Law. The Clearinghouse, which became an independent 501(c)(3) nonprofit organization in 2014, focuses exclusively on consumer privacy rights, privacy education, and privacy advocacy. *See*, <https://privacyrights.org/history>

1 **4. The Proposal Treats Class Members Equitably Relative to**
2 **Each Other, Considering the Court Rulings to Date**

3 The proposed settlement fairly allocates the relief among the class members
4 given the current status of the various claims. As noted above, only the members of
5 the Debt Collection Subclass have privacy claims that have not yet been decided in
6 favor of the Settling Defendants on the merits. The settlement provides that all of the
7 class members with unresolved privacy claims will receive monetary relief.

8 The remaining class members will benefit from the *cy pres* award, the reduction
9 of OCTA's maximum toll violation penalty going forward, and the agreement on the
10 PII that can be given to a third-party debt collector.

11 Class Counsel intend to apply for a service award for the Settlement Class
12 Representative. Service awards "are fairly typical in class action cases" and "are
13 intended to compensate class representatives for work done on behalf of the class, to
14 make up for financial or reputational risk undertaken in bringing the action, and,
15 sometimes, to recognize their willingness to act as a private attorney general."
16 *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). A service award
17 is appropriate here and does not constitute preferential treatment. The Class
18 Representative was not promised, nor conditioned his representation on the
19 expectation of a service award. *See* Zeldes Decl. ¶32. The Representative has spent
20 substantial time developing the case, conferring with counsel, answering multiple sets
21 of discovery requests, searching for and producing documents, and preparing and
22 testifying at his lengthy deposition (which delved in to details about his personal and
23 financial circumstances), over the past four years. *See, Id* ¶31. Given this significant
24 commitment, a service award is particularly appropriate.

25 **D. The Proposed Notice is Appropriate**

26 Federal Rule of Civil Procedure 23(e)(1)(B) requires the Court to "direct notice
27 in a reasonable manner to all class members who would be bound by the proposal if
28 giving notice is justified by the parties' showing that the court will likely be able to:

1 (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of
2 judgment on the proposal.” The best practicable notice is that which is “reasonably
3 calculated, under all the circumstances, to apprise interested parties of the pendency
4 of the action and afford them an opportunity to present their objections.” *Mullane v.*
5 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

6 Recent amendments to Rule 23(c)(2)(B) provide that “notice may be by one or
7 more of the following: United States mail, electronic means, or other appropriate
8 means.” Rule 23(c)(3) requires that class notice state in plain, easily understood
9 language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the
10 class claims, issues, or defenses; (iv) that a class member may enter an appearance
11 through an attorney if the member so desires; (v) that the court will exclude from the
12 class any member who requests exclusion; (vi) the time and manner for requesting
13 exclusion; and (vii) the binding effect of a class judgment on members.

14 For class members whose names and addresses cannot be reasonably
15 ascertained, “courts may use alternative means such as notice through third parties,
16 paid advertising, and/or posting in places frequented by class members, all without
17 offending due process.” *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 665 (7th Cir.
18 2015), *cert. denied*, __ U.S. __, 136 S. Ct. 1161 (2016); *see also Lilly v. Jamba Juice*
19 *Co.*, 308 F.R.D. 231, 239 (N.D. Cal. 2014) (noting that “an extensive but targeted
20 internet and print media campaign . . . aimed at providing notice to other potential
21 class members,” whose contact information was not on file, did not present due
22 process concerns). Moreover, courts have routinely approved notice via email. *See*,
23 *e.g.*, *Spann v. J.C. Penney Corporation* (C.D. Cal. 2016) 314 F.R.D. 312, 331; *In re*
24 *HP Inkjet Printer Litigation*, 2014 WL 4949584 (N.D. Cal, Sept., 30, 2014); *Noll v.*
25 *eBay, Inc.*, 309 F.R.D. 593, 605 (N.D. Cal., September 15, 2015). Plaintiff’s notice
26
27
28

1 plan, set forth in more detail below, meets the requirements of Rule 23(e)⁶.

2 The parties have developed a notice plan with the Class Administrator that will
3 include direct mail or email notice to the Debt Collection and Interoperability Subclass
4 members with known email or mailing addresses.⁷ The remaining class members will
5 be notified via publication and social media. Publication and social media are the only
6 way to provide notice to the members of the Interoperability Subclass who do not have
7 transponder accounts with the TCA. This is because names and addresses of account
8 holders are not shared for purposes of interoperability, and the only information
9 Settling Defendants have is license plate numbers and/or transponder hexID numbers.
10 That information cannot be converted to names and addresses by Settling Defendants
11 and is only available to the other toll agencies where such accounts are maintained.

12 Publication and social media notice to the members of the Interoperability,
13 DMV and Car Rental Subclasses is reasonable under the circumstances of this case
14 because the claims of those individuals have already been resolved in favor of Settling
15 Defendants. Settling Defendants do not collect email addresses as part of the toll
16

17 ⁶ The Parties have agreed that if the settlement is not approved, Plaintiff will be
18 required to give notice under FRCP 23(c) to those members of the class whose claims
19 will be pursued, without regard or reference to the settlement notice.

20 ⁷ Regarding Interoperability Subclass members who have accounts with the TCA,
21 the parties are requesting that the Court order the TCA to provide the name and
22 either the last known email address or last known mailing address of such Settlement
23 Class members (the “TCA Interoperability Subclass Member Information”).
24 Settlement Agreement, ¶ 7.02(a). As explained in Section V, *infra*, the parties also
25 request that, as part of the Preliminary Approval Order, the Court permanently
26 enjoin each member of the Settlement Class from filing or pursuing any claim or
27 litigation against any Settling Defendants, TCA, BRiC, any other person or entity
28 who provides information to the Class Administrator, and their respective officers,
agents, employees and attorneys asserting that compliance with the obligations
imposed by the Preliminary Approval Order and/or the Settlement Agreement
violates California Streets & Highways Code section 31490 or any other federal,
state or local constitution, statute, rule, regulation or policy purporting to limit the
disclosure of personally identifiable information.

1 enforcement process. And giving notice to these subclasses by mail would be cost
2 prohibitive – likely over \$400,000. That would leave no cash for distribution to those
3 class members who still have unresolved claims.

4 The publication notice campaign will include a print notice in the Los Angeles
5 Times, Orange County Register, Press-Enterprise as well as internet notice. Azari
6 Decl. ¶¶ 20-26. In addition, the Class Administrator will maintain a settlement website
7 with detailed information about the settlement, and a toll-free number that Settlement
8 Class Members can call to obtain more information. *Id.* ¶¶ 27-28.

9 All of the notices, attached as Exhibit B to the Settlement Agreement, are
10 drafted in plain English so they will be easy to understand. They include key
11 information about the Settlement, including the deadline to file a claim, the deadline
12 to request exclusion or object to the Settlement, and the date of the Final Approval
13 Hearing (and that the hearing date may change without further notice). The notices
14 state the maximum amount for attorneys’ fees and the cost awards Class Counsel will
15 request and the amount of the Service Award the Class Representative will request.

16 The notices disclose that, by participating in the Settlement, Settlement Class
17 Members give up the right to sue. They also disclose that Settlement Class Members
18 can choose not to participate in the settlement. The notices direct Settlement Class
19 Members to the settlement website for further information, where copies of the
20 notices, the Settlement Agreement, the complaint, the ruling on the Key Questions
21 Motion, and motions and orders relating to the Settlement will be posted. *See*
22 Settlement Agreement ¶8.02. The notices provide contact information for Class
23 Counsel to answer questions and instructions on how to access the case docket via
24 PACER or in person at any of the Court’s locations. Settlement Class Members will
25 have 84 days from the date the Class Administrator commences dissemination of
26 notice of the settlement to the Settlement Class Members to submit a claim, object to
27 the Settlement, or request exclusion from the Settlement. *See* Settlement Agreement
28 ¶¶ 2.07, 2.37. Class Administrator will post Class Counsel’s motion for attorneys’

fees on the settlement website at least 14 days before the deadline to object in accordance with *In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010). See Settlement Agreement ¶ 4.02.

E. The Claims Process is not Cumbersome

The claims process is straightforward and employs a tear-off postcard that eligible Settlement Class members can return to submit a claim for a cash distribution. Alternatively, eligible Settlement Class members may submit a claim form online. The claim form is easy to read and may be quickly and easily submitted online. The eligible Settlement Class members are identifiable from Settling Defendants' violator database on their computer system so that class members will not need to declare under penalty of perjury that they are entitled to monetary relief.

F. The Court Should Set Settlement Deadlines and Schedule a Hearing on Final Approval of the Settlement.

In connection with preliminary approval, the Court must set a final approval hearing date, dates for mailing the notices, and deadlines for objecting to the settlement, filing papers in support of the settlement, or request exclusion from the settlement. Plaintiff proposes the following schedule, which Plaintiff believes will provide ample time and opportunity for Settlement Class Members to decide whether to participate, request exclusion or object.

| EVENT | DATE |
|--|---|
| Settling Defendants provide notice of the settlement to the appropriate federal and state officials, as required by the Class Action Fairness Act (CAFA) | Within 10 days of the filing of this Motion. |
| Notice Date (Date when notices begin to issue) | No later than 71 days after the Preliminary Approval Order is signed (unless the TCA and 3M notices go out later than that, in which case the notices will be coordinated to go out at or around the same time) |
| Deadline to Submit Claim Forms | 84 Days from the Notice Date |

| | | |
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| 1 | Deadline to Object to the Settlement | 84 Days from the Notice Date |
| 2 | Deadline to Request Exclusion from the Settlement | 84 Days from the Notice Date |
| 3 | Deadline to Submit Motion for Attorneys' Fees, Costs, and Service Awards | 14 Days prior to the Objection Deadline |
| 5 | Deadline to Submit Motion for Final Approval | No later than 28 days before the Final Approval Hearing and no earlier than 14 days after the Objection Deadline |
| 7 | Final Approval Hearing | At Least 42 Days after the Objection Deadline |

V. ENJOINING SUIT BASED ON PROVIDING INFORMATION TO CLASS ADMINISTRATOR FOR NOTICE PURPOSES.

To effectuate the Preliminary Approval Order and to ensure adequate notice is provided to the members of the Settlement Class, and in accordance with both the Court's general authority to protect its jurisdiction and the All Writs Act (28 USC § 1651), Plaintiff also asks the Court to permanently enjoin each and every member of the Settlement Class from filing or pursuing any claim or litigation against Settling Defendants, TCA, and other persons or entities who provide information to the Class Administrator for notice purposes, asserting that compliance with the obligations imposed by the Preliminary Approval Order and/or the Settlement Agreement violates California Streets & Highways Code section 31490 or any other federal, state or local constitution, statute, rule, regulation or policy purporting to limit the disclosure of personally identifiable information. The Parties believe that this is necessary to allow the Settling Defendants and the TCA to provide contact information to the administrator and not be concerned that a Settlement Class member will bring suit claiming that the provision of their information to the administrator violated §31490 or other privacy law. This is a material aspect of the Settlement Agreement executed by the parties. *See* Settlement Agreement, ¶ 5.01(f). Issuing such an Order is within the clear authority of the Court to effectuate the proposed settlement. 28 U.S.C. §

1 1651; *see also United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977) (“This
2 Court has repeatedly recognized the power of a federal court to issue such commands
3 under the All Writs Act as may be necessary or appropriate to effectuate and prevent
4 the frustration of orders it has previously issued in its exercise of jurisdiction otherwise
5 obtained[.]”); *Keith v. Volpe*, 118 F.3d 1386, 1390 (9th Cir. 1997) (“All Writs Act, 28
6 U.S.C. § 1651, empowers the federal courts to enjoin state proceedings that interfere,
7 derogate, or conflict with federal judgments, orders, or settlements”); *Wright v. Linkus*
8 *Enterprises, Inc.*, 259 F.R.D. 468, 478 (E.D. Cal. 2009) (enjoining all class members
9 “from commencing actions against Defendants for claims covered by the Settlement
10 Agreement until the Court issues an order at the Final Fairness Hearing on the
11 proposed Settlement Agreement” pursuant to the Court’s authority under 28 U.S.C. §
12 1651(a)); *cf. Jacobs v. CSAA Inter-Ins.*, No. C07-00362MHP, 2009 WL 1201996, at
13 *2 (N.D. Cal. May 1, 2009) (“The district court has discretion to issue a preliminary
14 injunction where it is necessary and appropriate in aid of the court’s jurisdiction and
15 may enjoin named and absent members who have been given the opportunity to opt
16 out of a class from participating in separate class actions in state court”).

17 **VI. THE SETTLEMENT COMPARES FAVORABLE TO THE RECENTLY** 18 **APPROVED TCA SETTLEMNT**

19 Plaintiff recognizes that there is a natural inclination to want to compare this
20 settlement with the TCA settlement, which the Special Master recommended
21 preliminary approval of on December 30, 2020. There are significant substantive
22 reasons why the monetary amounts of this settlement are lower than the TCA
23 settlement.

24 First, TCA is settling claims that were not asserted against Settling Defendants.
25 Most significant among those is a claim that the TCA used the PII of drivers who used
26 TCA toll roads to market and advertise goods and services to those drivers without
27 first obtaining consent in violation of § 31490(j). The plaintiffs allege that the TCA
28 provided the PII of users of its toll roads to one or more third-party advertising

1 consultants who then used that PII to send advertising to class members. That claim
2 involves at least 13 million transmissions of PII. If plaintiffs proved this violation, the
3 TCA would face statutory penalties of \$2,500 to \$4,000 per transmission under §
4 31490. The TCA thus faced potential liability of over a billion dollars on the marketing
5 claim alone. Settling Defendants do not face that potential liability as Plaintiff is not
6 asserting and has seen no evidence that Settling Defendants provided PII of users of
7 the 91 Express Lanes to third-party advertisers. In addition, the TCA marketing claim
8 was not submitted to the Court for determination in the Key Questions Motion, and
9 thus remained entirely unresolved before the settlement with the TCA was reached.

10 Second, TCA's interoperability and enforcement settlement classes are
11 significantly larger than the Settlement Class. The TCA settlement has approximately
12 14 million class members, whereas this Settlement Class has approximately 1.3
13 million members. Thus, even without considering the impact of the ruling on the Key
14 Questions Motion, TCA had much greater exposure to § 31490 claims arising from
15 toll collection and enforcement procedures.

16 Third, TCA reached its tentative settlement both before the Court heard oral
17 argument on and before the Court issued its January 17, 2020 ruling on the Key
18 Questions Motion. So, at the time the TCA settled, it was not known whether the TCA
19 would prevail on the § 31490 claims submitted for determination. That lack of
20 certainty justifies the higher monetary amounts of the TCA settlement. The TCA and
21 the plaintiffs agreed that the issuance of the then-anticipated ruling would not be
22 binding on the TCA or impact the settlement and could not be used by either party to
23 back out of the settlement. In contrast, by the time Plaintiff and Settling Defendants
24 reached an agreement in principle on the terms of this settlement the parties all knew
25 that, at least at the trial court level, the Privacy Class would lose three of the four
26 certified class claims under § 31490. The claims on which the Court ruled against the
27 Plaintiff on the Key Questions Motion represent almost 4.5 million of the
28 approximately 4.8 million challenged PII transmissions (the vast majority of which

1 involve interoperability) – or about 93.5% of the challenged transmissions. After the
2 Court’s ruling on the Key Questions Motion, Settling Defendants faced just about
3 6.5% of the potential liability they faced before that decision was issued. At the time
4 the TCA settled, it faced 100% of its potential liability on the certified class claims.

5 Fourth, the TCA settlement class is broader than the previously certified TCA
6 class. The TCA settlement class includes all persons whose PII was shared in any way
7 by TCA during the class period, not just the persons who fall within the specific
8 certified subclasses. In contrast, this Settlement Class is limited to the certified
9 subclasses.

10 Fifth, the monetary benefits to eligible class members in this settlement are not
11 lower than the monetary benefits eligible members of the TCA class can receive.
12 Assuming a 5% response rate, each member of the TCA settlement class who submits
13 a valid claim will receive just under \$14.00. Assuming a higher 10% response rate,
14 each member of the Debt Collection Subclass eligible for a cash distribution (those
15 who do not have outstanding penalties that will be reduced) will receive \$15.00. Each
16 member of the TCA enforcement class who still owes a penalty is guaranteed a penalty
17 forgiveness of \$57.50. Each member of the Debt Collection Subclass who still owes
18 a penalty is guaranteed a penalty forgiveness of approximately \$40.00, plus the
19 reduction of every penalty that currently exceeds \$100.00 (maximum penalties are
20 currently between \$150 and \$195, depending on the number of violations) to \$100.00.
21 The amount of penalty forgiveness by TCA is higher than the amount to be forgiven
22 by TCA because TCA has significantly more outstanding debt than OCTA (primarily
23 because TCA has many more miles of roads, many more daily users of those roads,
24 and therefore, statistically, many more violators).

25 The TCA settlement includes a number of changes to the TCA’s practices that
26 are not relevant to Settling Defendants’ toll and penalty collection procedures and PII
27 sharing practice. The TCA agreed to limit the PII sent to the DMV for purposes of
28 DMV vehicle registration holds to only that information required by the DMV for

1 such holds. Settling Defendants haven't used DMV registration holds as an
2 enforcement mechanism during any portion of the class period. TCA also agreed to
3 reset all of its customers' "opt-in" status for receiving advertising and other similar
4 materials to "opt-out." Each TCA customer will now have to affirmatively change
5 their opt-in status before their PII is shared with an advertising company and such
6 materials are sent to them. Settling Defendants don't share customer PII with
7 advertisers and thus don't need to change the opt-in status of their customers.

8 Finally, the TCA settlement required the TCA to amend its privacy policy. But
9 OCTA already modified the privacy policy for the 91 Express Lanes to address some
10 of the claims asserted by the Plaintiff Class in late 2019. The amended privacy policy
11 went into effect on January 1, 2020.

12 **VII. CARVE-OUTS**

13 The following claims, none of which were asserted in this litigation, are
14 expressly carved out of the settlement:

15 - The claims expressly asserted in the January 6, 2020 First Amended
16 Complaint on file in the case entitled *Mathew Skogebo et al., vs. Cofiroute USA, LLC,*
17 *et al.*, Orange County Superior Court Case No. 30-2019-01118474;

18 - The claims expressly asserted in the January 13, 2020 Second Amended
19 Complaint on file in the case entitled *Harvey J. Thompson, et al., vs. Cofiroute USA,*
20 *LLC, et al.*, Orange County Superior Court Case No. 30-2019-01108804; and

21 - The claims expressly asserted in the January 3, 2020 Corrected First
22 Amended Complaint on file in the case entitled *Sanket Vinod Thakur, et al., vs.*
23 *Cofiroute USA, LLC, et al.*, United States District Court, Central District of California,
24 Case No. 8:19-CV-02233 ODW (JDEx).

25 **VIII. CONCLUSION**

26 Plaintiff respectfully requests that the Motion for Preliminary Approval be
27 granted and the Court enter an Order: (1) certifying the proposed Settlement Class for
28 purposes of this settlement; (2) preliminarily approving the proposed settlement; (3)

1 appointing the Class Representative and Class Counsel for purposes of this settlement;
2 (4) appointing Epiq Class Action & Claims Solutions, Inc. as the Class Administrator;
3 (5) approving the class notice and related settlement administration documents; and
4 (6) approving the proposed class settlement administrative deadlines and procedures,
5 including the proposed final approval hearing date and procedures regarding
6 objections, exclusions and submitting claim forms.

7
8
9 Date: April 12, 2021

Respectfully submitted,

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1 Pursuant to Local Civil Rule 5-4.3.4(a)(2)(i), the above-listed filing attorney
2 certifies that all other signatories listed, and on whose behalf this filing is submitted,
3 concur in this filing's content and have authorized its filing.

4
5 Date: April 12, 2021

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